(1)

88-164

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE WEYERHAEUSER COMPANY, Petitioner

v.

RUBEN BRACAMONTES, REYES PEREZ and
PABLO MARTINEZ, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Myron Timothy Boe
Jim Hunter Birch
Rose Law Firm
A Professional Association
120 East Fourth Street
Little Rock, AR 72201
(501) 375-9131

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

Whether the court below improperly engaged in judicial legislation by expanding coverage of the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C. § 1801, et seq., to workers engaged exclusively in forestry in disregard of the plain language of the statute and long standing agency interpretation?

LIST OF AFFILIATES

Pursuant to Rule 28.1, The Weyerhaeuser Company lists the following subsidiaries (excluding wholly-owned subsidiaries) and affiliates:

(1) Camac Veneer, Inc., an Oregon Corporation;
(2) Mountain Tree Farm Co., a Washington corporation;
(3) North Pacific Paper Corporation, a Delaware corporation;
(4) Pacific Veneer, Ltd., a Washington corporation;
(5) GNA Corporation, a Washington corporation;
(6) Premier Relocation Services, Inc., a California corporation;
(7) Tri-Wall Containers Limited, an Israeli corporation;
(8) Tri-Wall K. K., a Japanese corporation;
(9) Pacific Hardwoods, SDN. BHD., a Malaysian corporation; and
(10) Filam Forest Products, SDN. BHD., a Malaysian corporation.

PARTIES TO PROCEEDING BELOW

A. Plaintiffs/Appellants

Ruben Bracamontes
Reyes Perez
Pablo Martinez

B. Defendants/Appellees

The Weyerhaeuser Company
Mario Rodriguez
Guadalupe Rodriguez
Isabel Rodriguez
South Tex Reforesters
Juan Sendejo

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REFERENCE TO OPINIONS BELOW

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Bracamontes v. Weyerhaeuser, Docket Number 87-2456, 840 F.2d 271, rehearing and rehearing en banc denied, 845 F.2d 1022 (5th Cir. 1988).

JURISDICTION OF SUPREME COURT

(i) Date of Judgment sought to be reviewed:

March 22, 1988.

(ii) Rehearing and Rehearing En Banc denied:

April 25, 1988.

(iii) (Not Applicable.)

(iv) Jurisdiction of the Supreme Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pursuant to Sup. Ct. R. 21.1(f), Petitioner hereby sets out verbatim the pertinent portion of the Migrant and Seasonal Agricultural Workers Protection Act, 28 U.S.C. § 1802 (3), at issue:

> (3) The term "agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 29 U.S.C. 203(f), or section 3121(g) of title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

STATEMENT OF THE CASE

On February 27, 1987, Plaintiffs/Respondents Bracamontes, Perez, and Martinez ("Plaintiffs") filed this action under the Migrant and Seasonal Agricultural Workers Protection Act (MSPA) against Defendant/Petitioner The Weyerhaeuser Company ("Weyerhaeuser") and Defendant South Tex Reforesters ("South Tex") in the United States District Court for the Southern District of Texas, Brownsville Division. Plaintiffs allege jurisdiction of the District Court based on 29 U.S.C. § 1854(a), 28 U.S.C. § 1331, and 28 U.S.C. § 1337. Plaintiffs asked the District Court to force Weyerhaeuser's compliance with the "non-employer related confirmation of registration obligation under AWPA [MSPA]". Complaint, ¶ 2 (App. D). Plaintiffs claim they were "migrant agricultural workers" under 29 U.S.C. § 1802(8). Complaint, ¶ 5 (App. D). In order to be migrant agricultural workers, plaintiffs must be engaged in "agricultural employment" as defined by MSPA. 29 U.S.C. § 1802(3).[1]

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[1]Prior to the filing of the instant suit, South Tex requested an opinion from the Department of Labor ("DOL"), as to whether South Tex forestry operations were covered by MSPA and whether South Tex would be required to register as a farm labor contractor under MSPA. In response to Defendant South Tex' request on February 24, 1987, DOL Administrator Paula V. Smith opined:

> It is the position of the Department [of Labor] that forestry and reforestration workers are not engaged in agricultural employment within the meaning of MSPA and are therefore not covered by the Act.
>
> In view of this position, you and your associates who employ workers to engage in the forestry operations named in your letter would not be subject to the registration requirement of MSPA." (App. E). (Emphasis added).

To comply with the Ninth Circuit Court of Appeals' injunctive decision in Bresgal v. Brock, 833 F.2d 763, opinion modified, 843 F.2d 1163 (9th Cir. 1987), the DOL changed its enforcement policy on February 17, 1988.

On April 15, 1987, the District Court granted Weyerhaeuser's Motion to Dismiss, because MSPA did not apply to parties engaged exclusively in forestry activities. (App. B).

Plaintiffs appealed the dismissal to the United States Court of Appeals for the Fifth Circuit. Acknowledging "the question is a close one and either of the interpretations argued are plausable", the three judge Panel[2] reversed Bracamontes v. Weyerhaeuser, 840 F.2d 271, 272, rehearing denied, 845 F.2d 1022 (5th Cir. 1988), (see App. A). Thus, "agricultural employment" under MSPA was expanded to include the employment of migrant workers to plant pine seedlings in forests.

In reviewing the District Court's dismissal of the case under Fed. R. Civ. P. 12(b)(6), the facts alleged in the Complaint must be assumed to be true. As alleged in the Complaint, Weyerhaeuser contracted with Defendant South Tex, and its owners, to perform tree planting on Weyerhaeuser lands along the Mississippi/Alabama border between 1984 and 1987.

South Tex recruited workers from the Rio Grande Valley of Texas to perform this work and transported those workers to Alabama. It is undisputed the plaintiffs' work on Weyerhaeuser's lands was limited exclusively to the planting of pine seedlings, and they were engaged exclusively in forestry. See Complaint at ¶ 32 (App. D).

MSPA was enacted to replace the Farm Labor Contract Registration Act ("FLCRA"), formerly codified at 7 U.S.C. § 2041, et seq. FLCRA was first enacted in 1963. Coverage under FLCRA was limited to interstate activity, hence the definition:

> "'interstate agricultural employment' means employment in any service or activity included within the provisions of § 3(f) of the Fair Labor Standards Act ["FLSA"]. . . . or § 3121(g) of the Internal Revenue Code of 1954 ["IRC"]."

Pub. L. No. 88-582 § 3, 78 Stat. 920, Sept. 7, 1964 (formerly codified at 7 U.S.C. § 2042(d), set out in History following 7 U.S.C. § 2042 (1979 Vol.)). See also 29 C.F.R. Parts 40, 41.

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[2]Honorable Circuit Judges Timbers, King and Higginbotham comprised the Panel.

The definition of "agricultural employment" at issue here was first enacted as a 1974 amendment to the FLCRA, then adopted without alteration when the MSPA was enacted. See 7 U.S.C. § 2042(d); Pub. L. No. 93-518 § 2, 3, 88 Stat. 1652, Dec. 7, 1974. FLCRA defined "migrant worker" without reference to the term "agricultural employment." Rather, the FLCRA, both before and after the 1974 amendments, defined such workers by reference to FLSA and IRC. 7 U.S.C. § 2042(g) (1979 Vol.). The DOL issued regulations in its administration of the FLCRA, codified at 29 C.F.R. Parts 40, 41.

The MSPA definition of "agricultural employment", upon which Plaintiffs' case is based, is the same as the definition which existed under the FLCRA. The core of the definition incorporates by reference, without restating, terms first used in the FLSA and the IRC.

MSPA seeks to correct abuses of, and provide protections for, workers of a migrant and seasonal nature employed in agriculture. Pub. L. No. 97-470, 96 Stat. 2584 (1983), codified at 29 U.S.C. § 1801-1872. The workers protected by MSPA are expressly limited by the definitions set out at 29 U.S.C. § 1802, many of which are based on the definition of "agricultural employment", stating in relevant part as follows:

> (3) The term "agricultural employment" means employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 29 U.S.C. § 203(f), or section 3121(g) of title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state. [Emphasis Supplied].

29 U.S.C. § 1802(3). Utilizing that definition, "migrant agricultural worker" is then defined, with certain exceptions not relevant here, as "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802(8)(A) (emphasis added). Similarly, "seasonal agricultural worker" is defined as "an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not

required to be absent overnight from his permanent place of residence . . . " 29 U.S.C. § 1802(10)(A) (emphasis added). Regulations implementing the MSPA are published at 29 C.F.R. Part 500.

In analyzing the above definition, the Fifth Circuit dissected § 1802(3) into three separate "prongs":

(1) employment in any service or activity included within the provisions of Section 3(f) of the FLSA;

(2) employment in any service or activity included within the provisions of Section 3121(g) of the IRC; and

(3) the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

The Fifth Circuit found forestry work is excluded from the definition of agricultural employment under the first two prongs of the above definition (i.e., "forestry" is expressly excluded from "agriculture" under long standing regulations applicable to the FLSA and IRC). 840 F.2d at 272-73. However, the Court of Appeals found the 1974 amendments to the FLCRA which added the so-called "third prong" of the above definition expanded the Act's coverage so as to include forestry by implication within the definition of "agricultural employment". 840 F.2d at 273-74.

The Court of Appeals based its expansion of MSPA through the 1974 FLCRA amendment on a statement in a Senate committee report which was made, not in reference to the "third-prong" amendment on which the Court of Appeals based its expansion, but during a discussion of the bill generally. The report states:

> The Committee has been informed by the Commissioner of the Immigration and Naturalization Service that some government agencies have permitted the employment of illegal aliens as tree planters, thinners and other forest laborers by awarding contracts to forestry contractors who regularly employ aliens who have illegally entered the United States. The provisions of this bill and its penalties are intended to apply to such contractors. The Committee urges the appropriate authorities to investigate this matter and to take all steps necessary to assure that such contracts are not awarded to these contractors.

See, S. Rep. No. 1295, 93d Cong., 2d Sess. 4 (1974) as reprinted in [1974] U.S. Code Cong. & Admin. News, 6441, 6444-46.

The Court of Appeals also based its finding upon a remedial policy consideration:

> . . . [i]t is inconceivable that Congress intended to protect workers planting fruit trees in an orchard, and to disregard workers planting fir trees on a hillside, when both groups suffer from the same clearly identified harm.

Bracamontes, 840 F.2d at 275 (quoting Bresgal, 833 F.2d at 766).

ARGUMENT

The FLCRA and the MSPA extend coverage only to those engaged in "agricultural employment". From the plain language of 29 U.S.C. § 1802(3) and 29 U.S.C. § 203(f), forestry or lumbering activities are not included within the definition of "agricultural employment", unless they are performed by a farmer on a farm. Otherwise, forestry activities are excluded from the FLCRA and the MSPA.

By holding forestry is included within the definition of "agricultural employment" under the MSPA, the Court of Appeals performed a legislative, rather than interpretative, function by amending MSPA. Regardless of the merits of a policy, judges should not amend an act of Congress. This is especially true where the intent of Congress is plain and unambiguous. See, Laborer's Health and Welfare Trust Fund of Northern Cal. v. Advanced Lightweight Concrete Co., ___ U.S. ___, 108 S.Ct. 830, 837 (1988). ("Laborer's Health Fund"). This expansion of the Act's coverage is beyond the province of the judiciary. Id.

The Court of Appeals disregarded the clear intent of Congress and held forestry workers are engaged in "agricultural employment" under MSPA. The Court's holding is contrary to several canons of statutory construction: The Court of Appeals ignored the clear language of the Act and based its holding, to a large extent, on a single

ambiguous statement in the legislative history[3] of the FLCRA; the Court of Appeals failed to afford due deference to the longstanding Department of Labor ("DOL") interpretation of MSPA so as to exclude forestry from the definition of "agriculture"; and the Court of Appeals' decision repeals a portion of MSPA by implication and renders that portion superfluous.

The Court of Appeals' reliance upon Bresgal v. Brock, 833 F.2d 763 (9th Cir. 1987), is equally contrary to the canons of statutory construction. The reasoning upon which the Bresgal decision (and ultimately the Fifth Circuit's decision) relied is unworthy of the weight given it.

A. By Expanding MSPA Coverage to Include Forestry Workers the Court of Appeals Performed a Legislative Function which is Beyond the Province of the Judiciary.

The Court of Appeals stated it is "inconceivable" Congress intended MSPA coverage for certain migrant workers and not others. 840 F.2d at 275. However, a line delineating the extent of MSPA coverage inevitably must be drawn. MSPA does not deal with all situations falling within the general mischief which gave rise to the legislation.

Congress, in enacting the Fair Labor Standards Act, for example, did not exercise the full extent of its power. It did not intend to cover every source of activity or enterprise that might in some form or fashion, at some time or other, have some bearing upon the production of goods by someone. Parham v. Austin Co., 158 F.2d 566, 567-68 (5th Cir. 1946). "Congress did not intend that the regulation of hours and wages should extend to the farthest reaches of federal authority." McLeod v. Threlkeld, 319 U.S. 491, 493 (1943). See also, Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207, 211 (1959).

Similarly, as shown by its legislative history, MSPA is not co-extensive with the limits of the power of Congress over commerce. The purpose of MSPA is ". . . to remove the restraints on commerce

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[3]A thorough examination of the legislative history associated with consideration and passage of the 1974 FLCRA amendment shows Congress' intent was to expand coverage only vertically to all steps in the production chain, but not horizontally to growing operations not previously covered. See Part II.D. infra.

caused by activities detrimental to migrant and seasonal agricultural workers. . . ." 29 U.S.C. § 1801. (Emphasis added). For example, Congress could have considered and enacted coverage of MSPA to all migrant and seasonal workers, without restriction to agriculture. But, it did not.

When lines have to be drawn, they are bound to appear arbitrary when judged solely by borderline cases. See, 10 East 40th Street Building, Inc. v. Callas, 325 U.S. 578, 580 (1945). The distinction made between agricultural workers and forestry workers for purposes of MSPA coverage may appear to the Fifth Circuit to be arbitrary. But, so is a decision to include "agricultural employment" but exclude non-agricultural employment. The line-drawing necessary to state the extent of MSPA coverage is properly the function of Congress, not the judiciary.

Despite the clear language of the statute, the absence of any express intent on the part of Congress to extend MSPA coverage to forestry workers and years of agency interpretation excluding "forestry" from "agriculture," the Court of Appeals stated: "The suggested narrow reading of § 203(f) [of FLSA] to the MSPA would disserve the Act's remedial purpose." 840 F.2d at 276. Thus, the Court of Appeals based its reasoning upon policy considerations, i.e., that exclusion of forestry from MSPA coverage was inconsistent with the Act's purpose. Even in interpreting remedial statutes, the Court must look to the plain meaning of the statute. Accordingly, in Laborer's Health Fund, supra, this Court rejected an expansion of remedies under the Employment Retirement Income Security Act, §§ 502(g)(2) and 515, 29 U.S.C. §§ 1132(g)(2) and 1145, stating:

> Our principal reason for rejecting these arguments is our conviction that Congress' intent is so plain that policy arguments of this kind must be addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it. We nevertheless note that there are countervailing policy arguments that make it highly unlikely that the limited reach of the statute is the consequence of inadvertence rather than deliberate choice.

Laborer's Health Fund, 108 S.Ct. at 837.

The Court of Appeals reasoned that including forestry within MSPA was consistent with the Act's purpose of preventing farm labor contractor exploitation of migrant and seasonal laborers. 840 F.2d at 274-75. This reasoning ignores the fact that Congress did not bring all agricultural workers within MSPA in spite of the possibility that all agricultural workers may be subject to the same evils. See, 29 U.S.C. § 1803(a). Reliance upon the "similar abuse" theory also ignores the fact that longstanding remedial labor standards acts, such as the FLSA and NLRA, (840 F.2d at 276), included forestry workers, but not agricultural workers. Thus, forestry workers have available remedies from which agricultural workers are precluded.

It is improbable that Congress, through the 1974 FLCRA Amendments, intended to extend coverage to the forestry and timber business, one of our largest industries (Complaint at 16-19, App. D), without expressly so stating. It is inconceivable Congress would expand FLCRA and MSPA coverage by mere implication as found by the Court of Appeals. "Forestry is a common word. Legislators know it, and can use it. They did not." Bresgal, 833 F.2d at 774 (9th Cir. 1987), (Anderson, J., dissenting).

B. The Court of Appeals Failed to Give Due Deference to the Longstanding Department of Labor Interpretation of "Agricultural Employment" Excluding Forestry from that Definition.

1. The Department of Labor's Interpretation of "Agricultural Employment" Need Only Be Reasonable To Be Entitled To Deference.

It is axiomatic the DOL's interpretation of MSPA, for which it has primary enforcement responsibility (See 29 U.S.C. § § 1802(11), 1853, 1855, 1861, 1862, 1863, and 1872), need not be the best one by grammatical or any other standards. As this Court has noted:

> [The] view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of [the statute] is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency] (emphasis added)

Chemical Mfr. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125 (1985). See also E.E.O.C. v. Commercial Office Products Co., ___ U.S., ___, 108 S. Ct. 1666, 1671 (1988); and Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980).

The DOL's exclusion of forestry from the definition of agricultural employment is indeed reasonable. Courts in numerous jurisdictions have examined, in various contexts, whether forestry and related functions are included within the definition of "agriculture." For example in Appleman v. Employment Division, 21 Or. App. 186, 534 P.2d 218 (1975), the court held:

> We cannot view the raising of commercial timber seedlings as being an operation which is commonly regarded as associated with farming in its "traditional sense" regardless of whether the seedlings are sold to others or retained and raised for timber. Although, as the court explained in [Just-A-Mere Farm, Inc. v. Peet, 247 Or. 413, 430 P.2d 987 (1967)] it is not uncommon to refer to timber as a "crop," the growing of trees, and in this seedlings, is not understood in the common parlance as an agricultural operation.

Id., 534 P.2d at 220. See also, N.L.R.B. v. Scott Paper Co., 440 F.2d 625, 626 (1st Cir. 1971), (Woodsmen employed to fell, top, limb and buck trees and then haul them to a pick-up area were not "agricultural workers," expressly exempted from the NLRA.)

Other cases which exclude forestry operations from the definition of agriculture include Plumfield Nurseries, Inc. v. Dodge County, 184 Neb. 346, 167 N.W.2d 560, 563, (1969); Sniegowski v. Bureau of Unemployment Compensation, 11 Ohio App. 2d 73, 228 N.E.2d 679, 681 (1966); and Kirby Lumber Corp. v. Hardin Independent School Dist., 351 S.W.2d 310, 312 (Tex. Civ. App. 1961).

The DOL's interpretation of "agriculture" to exclude forestry is indeed reasonable. "In common parlance, the commercial logging industry is not ordinarily thought to be an agricultural industry nor are commercial loggers and forestry workers considered to be agricultural laborers." Bresgal, supra, 833 F.2d at 774 (9th Cir. 1987) (Anderson, J., dissenting).

A reasonable agency interpretation of an act bears particularly

great weight, if the agency assisted in drafting the statute. Miller v. Youakim, 440 U.S. 125, 144 (1979). The DOL was involved in drafting the 1974 FLCRA Amendments which added to the definition of "agricultural employment" as well as the drafting of MSPA. S.Rep.No. 93-1295, 93rd Cong. 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Adm. News 6441, 6445.

2. The Fact Congress Knew The DOL's Interpretation of "Agricultural Employment" Excluded Forestry When It Re-enacted FLCRA and MSPA Is Persuasive of Congress' Intent.

The judicial analysis in the instant case should closely parallel that of this Court in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). In Bell Aerospace, this Court dealt with interpretation of Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(3), which provides for exclusion of certain employees from NLRA coverage. It was argued that even though persons employed as buyers were properly classified as "managerial employees," they were nonetheless entitled to NLRA protections. Bell Aerospace, 416 U.S. at 270-71.

The Court rejected this argument and held all employees properly classified as "managerial" positions are excluded from NLRA coverage. Id., 416 U.S. at 275. The NLRB interpreted Section 2(3) of the NLRA to exclude all managerial employees from the Act's coverage for more than two decades, before Congress subsequently re-enacted the same provisions without pertinent change. In so holding, the Court stated:

> [A] court may accord great weight to the long standing interpretation placed on a statute by an agency charged with its administration. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). This is especially so where Congress has re-enacted the statute without pertinent change. Zemel v. Rusk, 381 U.S. 1, 11-12 (1965). In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. Zemel v. Rusk, supra, at 11-12.

Bell Aerospace, supra, 416 U.S. at 275. Accord, United States v. Rutherford, 442 U.S. 544, 544 (1978); and CBS, Inc. v. FCC, 453

U.S. 367, 382 (1980), ("Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives."). See also Zenith Radio Corp. v. United States, 437 U.S. 443, 457 (1978).

Application of the foregoing reasoning to the instant case can lead only to the conclusion the DOL's longstanding interpretation of "agriculture" to exclude forestry is the one intended by Congress for purposes of MSPA coverage.

The Department of Labor interpretative regulations in existence and followed for forty years exclude "forestry" from the definition of "agriculture." That interpretation was first codified in 1947 at 29 C.F.R. § 780.60 et seq. (1947). As relevant here, 29 C.F.R. § 780.62 (1947) (12 Fed. Reg. 5961-62, (September 9, 1947)), states:

> While "agriculture" is sometimes used in a broad sense as including the science and art of cultivating forests, its application has been limited in Section 3(f). The language of that section clearly indicates that forestry and lumbering operations are practices which will be considered agricultural only if "performed by a farmer on a farm as an incident to or in conjunction with such farming operations." [Emphasis added]

The current applicable regulations are substantively identical. 29 C.F.R. § 780.200. Additionally, the current regulations, at 29 C.F.R. § 780.115, state:

> Trees grown in forests and the lumber derived therefrom are not "agricultural or horticultural commodities." Christmas trees, whether wild or planted, are also not so considered. It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within Section 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or her farming operations. [Emphasis added]

These agency interpretations of "agriculture" and "agricultural or horticultural commodity" were in existence at the time Congress passed the FLCRA in 1963, the amendment to the FLCRA in 1974 and MSPA in 1983. Courts will generally presume presume

Congress is knowledgeable about existing law pertinent to the legislation it enacts. Goodyear Atomic Corp. v. Miller, _____ U. S. _____, 108 S. Ct. 1704, 1711-12 (1988).

For nine years subsequent to the 1974 amendments to the FLCRA, the DOL continued to interpret the statute so as to exclude forestry workers from the definition of "agricultural employment." Congress did not indicate, either in the text of MSPA or in the legislative history pertinent to the definition of "agricultural employment", a desire to change the DOL's interpretation.

> From 1974 to the present, the crucial provisions and language of the Act have remained the same. The Act was thoroughly reviewed by Congress in 1983, yet no changes were made to extend the Act to commercial forestry and logging operations. Forestry is a common word. Legislators know it, and can use it. They did not. Bresgal, 833 F.2d at 774 (9th Cir. 1987), (Anderson, J., dissenting) (Emphasis added).

Thus, as shown by Judge Anderson, Congress understood the ordinary usage of "agriculture" and "forestry", but did not include "forestry" within "agriculture" in FLCRA or MSPA.

The Fifth Circuit acknowledged the DOL's interpretation of the MSPA excluding forestry from agriculture was entitled due deference. 840 F.2d at 276. After noting deference is due, the Court of Appeals ignored the DOL interpretation excluding forestry from coverage under MSPA. Id. Although the DOL, under FLSA, always exempted agricultural employment from its provisions, the Court of Appeals stated:

> The Supreme Court has declared that FLSA exemptions should be construed narrowly, which DOL recognizes. Relatedly, the MSPA is remedial in nature and must be read broadly. The suggested narrow reading of § 203(f) to the MSPA would disserve the Act's remedial purpose.

Id., 840 F.2d at 276 [footnotes omitted].

The Court of Appeals acknowledged the DOL interpretation, but based its reasoning upon policy considerations [i.e., that the DOL's interpretation was inconsistent with the MSPA's purpose]. However, such ". . . policy arguments . . . must be addressed to the

body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it." Laborer's Health Fund, supra, at 837.

C. The Definition of "Agricultural Employment" Is Clear and Unambiguous on the Face of MSPA. The Court of Appeals' Reliance on MSPA's Legislative History Is Inappropriate.

MSPA defines "agricultural employment" as follows:

> (3) The term 'agricultural employment' means employment in any service or activity included within the provisions of Section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203(f)), or Section 3121(g) of Title 26 [FICA] and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

29 U.S.C. § 1802(3). [Emphasis added]

Before the Fifth Circuit, Weyerhaeuser argued the 1974 FLCRA amendments expanded coverage to intrastate, as well as interstate commerce and also added coverage for employment involving the processing of agricultural commodities in an unmanufactured state. The 1974 amendments expanded coverage vertically to all steps in the production chain of products previously covered by the FLSA and IRC definitions, but not horizontally to growing operations not previously covered, such as forestry.[4] As the Court of Appeals stated:

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[4]Weyerhaeuser's argument is supported by the Fifth Circuit's holding in Almendarez v. Barrett-Fisher Co., 762 F.2d 1275, 1281 (5th Cir. 1985), ("We perceive the purpose of the amended act to have been to check, as fully as possible, the abuses of the middlemen between farmers and migrant workers. The very reason for the 1974 amendment was to implement this purpose more fully by expanding the coverage of the act to include persons such as packing shed operators. S.Rep. No. 93-1295, 93rd Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Adm. News 6441, 6448."). This is a vertical, not horizontal interpretation of the Act.

"The question is a close one and either of the interpretations urged are plausible." 840 F.2d at 274.

The Court of Appeals acknowledged its interpretation of the 1974 amendment goes beyond the plain meaning of MSPA:

> The vertical expansion of the act is plain, but it is not plain that Congress intended more.

840 F.2d at 275. (Emphasis added).

Therefore, any horizontal expansion by the Court of MSPA coverage constitutes clear judicial legislation.

Despite the admitted lack of facial ambiguity in the MSPA, the Court of Appeals relied heavily upon MSPA's legislative history to conclude the 1974 amendment expanded coverage to forestry workers[5].

Where, such as here, the language of a statute is clear and unambiguous, it is unnecessary and improper to look toward the legislative history for help in defining legislative intent. Escondido Mutual Water Co. v. La Jolla Indians, 466 U.S. 765, 772 (1984); and United States v. Oregon, 366 U.S. 643, 648 (1961). "Reliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously." Piper v. Chris-Craft Industries, 430 U.S. 1, 26 (1976).

"[A] statute clear and unambiguous on its face, need not and cannot be interpreted by a court and only statutes which are of doubtful meaning are subject to the process of statutory interpretation." Sutherland, Statutory Construction § 45.02 (4th Ed. 1985). The Court of Appeals' extensive reliance upon legislative history, 840 F.2d at 274, instead of the statutory language, was inappropriate for determination of Congress' intent in amending the FLCRA in 1974.

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[5]The Court of Appeals did not address the lack of facial ambiguity in MSPA, but went directly to the legislative history. 840 F.2d at 274. The legislative history relied upon by the Court of Appeals is that of the 1974 amendments to the FLCRA—not the current statute, MSPA. Nowhere in the legislative history of MSPA is there any express indication Congress intended the definition of "agriculture" to include forestry.

D. MSPA's Legislative History Indicates Congress' Intent Was To Expand Coverage Only Vertically.

The Senate Report on the 1974 FLCRA amendments, summarizing the legislation, notes it "extends the Act's coverage," and goes on to state that it:

> "[D]eletes the Act's limitation of coverage by including intrastate ... transactions .... The bill also adds coverage for employment involving the processing of agricultural commodities in an unmanufactured state. [emphasis added]

S. Rep. 93-1295, 93d Cong., 2d Sess. 5-6 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 6441, 6447 (emphasis added). The same Senate Report, discussing the specific section of the bill contained the amendment at issue, stated:

> Section 3 amends section 3(d) of the Act providing coverage to all aspects of commerce in agriculture, including that defined in either the Fair Labor Standards Act ..., and other processing of agricultural or horticultural commodities in an unmanufactured state.

Id. at 8, 1974 U.S. Code Cong. & Ad. News at 6448 (emphasis added).

The House Report contains virtually the same description of the way in which the bill is "extending the coverage of the Act," stating that "[t]he bill also adds coverage for employment involving the processing of agricultural commodities in an unmanufactured state." H.R. Rep. No. 93-1493, 93d Cong. 2d Sess. 1 (1974) (emphasis added). See also, S. Rep. 93-1295 at 8, describing the amendment as "providing coverage to all aspects of commerce in agriculture, including ... other processing of agricultural or horticultural commodities in an unmanufactured state."

Virtually identical descriptions of the way in which this amendment "expanded" the Act's coverage are contained in the floor debates when the first version of the bill containing the amendment was introduced. Cong. Rec. S18127 (daily ed. October 3, 1974) (introducing the Senate version of the amendment); Cong. Rec. S18130 (daily ed. October 3, 1974) (stating that the amendment

"also adds coverage for employment involving the proceeding [sic] of agricultural commodities in an unmanufactured state").

Neither the language of the 1974 amendment, nor the legislative history discussing that aspect of the bill, establishes any intent to expand the definition of "agricultural and horticultural commodities" to include forestry work as found by the Court of Appeals. To the contrary, as both the language and the legislative history make clear, Congress retained the language "agricultural or horticultural commodity" long interpreted to exclude forestry. The expansion merely encompassed various aspects of the processing of these materials, traditionally considered agricultural and horticultural commodities, in intrastate transactions.

E. The Court of Appeals' Interpretation of MSPA Renders a Portion of the Act Superfluous.

By interpreting the so-called "third prong" of MSPA's definition of "agricultural employment" to include all forestry operations within that definition, the Court of Appeals ignores the first two prongs of the definition. The first prong of the MSPA, Section 3(f) of the FLSA, unambiguously states forestry and lumbering operations are covered only when they are "performed by a farmer on a farm as an incident to or in conjunction with farming operations." 29 U.S.C. § 203(f). Inclusion of forestry and lumbering operations only if performed by a farmer on a farm becomes superfluous if, as the MSPA is interpreted by the Court of Appeals, all forestry operations are deemed to be within the MSPA's definition of "agricultural employment." "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." Sutherland, supra at § 46.06. A repeal by implication is disfavored by the law and should only be found when provisions of a statute are irreconcilable. Kremer v. Chemical Construction Corp., 456 U.S. 461, 467 (1982).

Even if MSPA's definition of "agricultural employment" included only the so-called "third prong" on which the Court of Appeals relies, the definition can only be interpreted to exclude forestry from coverage under the Act. The third prong defines "agricultural employment" as certain activities relating to an

"agricultural or horticultural commodity in its unmanufactured state." As noted by the Court of Appeals, the DOL's regulations expressly exclude timber products, etc. from the definition of "agricultural or horticultural commodity":

DOL specifically has stated that "[t]rees grown in forests and the lumber derived therefrom are not 'agricultural or horticultural commodities'. . . ." (emphasis added)

840 F.2d at 273, n. 7.

F. The Court of Appeals' Reliance upon Bresgal v. Brock is Inappropriate.

The Court of Appeals relies heavily upon Bresgal v. Brock, supra, a two to one decision containing a vigorous, well-reasoned dissent by Judge Anderson.[6] The reasoning of the majority opinion in Bresgal is based, in large part, upon the opinion of District Judge Burns in Bresgal v. Brock, 637 F.Supp. 271 (D. Or. 1985). The foregoing comments regarding the Fifth Circuit's reasoning in the instant case are equally applicable to the reasoning of the District Court in Bresgal. The cases relied upon by Judge Burns in Bresgal are entitled to little, if any, weight.

Judge Burns relied heavily upon a March 19, 1984 interlocutory opinion in Aguirre v. Davis Forestry Corp., Civ. B-81-142 (S.D. Tex.), (App. F) which, upon reconsideration by Judge Vela of the Southern District of Texas was overturned. Aguirre v. Davis Forestry, B-81-142 (S.D. Tex. March 13, 1987). (App. G). In an Order dated March 13, 1987, Judge Vela rejected his entire March 19, 1984 Order relied on by Bresgal, and granted Davis

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[6]In a dissenting opinion, Judge Anderson stated, inter alia: "The specific intent found by the majority is not expressed in the language of the Act. It derives from a stray remark by the Senate that 'the provisions of this bill and its penalties are intended to apply to such contractors.' 1974 U.S. Code Cong. & Adm. News at 6441, 6444. This issue was not addressed by the House nor was the remark or its substance included in the 1974 or 1983 Amendments. If anything, this stray remark indicates Congress' awareness of the difference between forestry and agricultural workers. The fact that there was no further mention or discussion of this issue suggests to me that the inclusion of forestry workers was considered and rejected by Congress." Bresgal, supra, 833 F.2d at 774-75. (emphasis added)

Forestry's Motion for Summary Judgment. Instead, Judge Vela adopted Magistrate William M. Mallet's finding that FLCRA (MSPA's predecessor) was clear and unambiguous on its face. (App. G):

> [T]he plain language of the FLCRA itself demands such a recommendation, and it would be beyond this Court's jurisdiction to encroach upon the legislative responsibilities granted to Congress by the Constitution (emphasis added).

Aguirre v. Davis Forestry Corp., supra, (App. G).

Likewise, Judge Burns' reliance upon Davis Forestry Corp. v. Smith, 707 F.2d 1325, 1328 n. 3 (11th Cir. 1983), does not support the inclusion of forestry within FLCRA or MSPA. In Davis, the sole issue was the standing of a competitor of an alleged farm labor contractor to challenge his noncompliance with the FLCRA. Davis held plaintiff had no standing and dismissed the case, eliminating the necessity for determination of whether the parties were farm labor contractors under FLCRA. Id. at 1328. Certainly, reliance upon mere dictum to overturn years of DOL interpretation and reach a construction of MSPA contrary to the clear meaning of the statute is unfounded.

V. CONCLUSION

Congress could have included forestry activities within FLCRA or MSPA. It plainly did not. Policy arguments to expand MSPA's coverage to forestry should be addressed to Congress. Congress, not the courts, should make the important policy decision to expand MSPA to forestry, one of our nation's largest industries. Weyerhaeuser petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and reverse the Circuit Court's decision in Braçamontes v. Weyerhaeuser, Docket Number 87-2456, 840 F.2d 271, rehearing and rehearing en banc denied, 845

F.2d 1022 (5th Cir. 1988).

Respectfully submitted,

ROSE LAW FIRM
A Professional Association
120 East Fourth Street
Little Rock, AR 72201
(501) 375-9131

By:
Tim Boe

By:
Jim Hunter Birch

Walter Passmore
Ewers, Toothaker, Ewers,
Abbot, Talbot
Hamilton & Jarvis
111 Nolana,
P.O. Box 3670
McAllen, Texas 78501

CERTIFICATE OF SERVICE

I, Tim Boe, do hereby certify that I mailed copies of the above and foregoing Petition for Writ of Certiorari to Marc Linder, Texas Rural Legal Aid, Inc., 259 South Texas, Weslaco, TX 78596, Ronald Hole, Atlas & Hall, P.O. Drawer 3725, McAllen, TX 78502, and Walter Passmore, Ewers, Toothaker, Ewers, Abbot, Talbot, Hamilton & Jarvis, 1111 Nolana, P.O. Box 3670, McAllen, TX 78501, on this 21 day of July, 1988.

Tim Boe